

APPENDIX

FILED

JUN 20 1983

ALEXANDER L. STEVAS.

Pages RK

Document

- | | |
|---|---------|
| 1. Order Regarding
Applicable Law | 1 - 15 |
| 2. Order Denying Motion
for Summary Judgment | 16 - 17 |
| 3. Judgment of Dismissal | 18 - 19 |
| 4. Judgment of
Court of Appeals | 20 - 28 |
| 5. Military Police Report | 29 - 32 |

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-Z-996

JAMES ALLEN BUDDE, and)	
ARGONAUT INSURANCE COMPANY,)	
)	
Plaintiffs,)	
)	ORDER
VS.)	REGARDING
)	APPLICABLE
KENTRON HAWAII, LTD., and)	LAW
JESSIE B. FRANCIS,)	
)	
Defendants,)	

WEINSHIENK, Judge

This case which results from a one-car accident which occurred on September 27, 1970, in South Vietnam, is before the Court for determination of the applicable law. Both the driver of the vehicle, Defendant Jessie B. Francis, (hereinafter "Francis") and the injured passenger, Plaintiff James Allen Budde, (hereinafter "plaintiff" or "Budde") are United States citizens who were at that time civilian employees of different American corporations doing United States Government contract work in South Vietnam. Plaintiff

filed the action in this court against Francis and his employer, Kentron Hawaii, Ltd. ("Defendant" or "KHL"). Francis has never been served and, according to KHL, cannot be located by either party. See KHL's Trial Brief, p. 10. Argonaut Insurance Company has been allowed to intervene as a party plaintiff for the purpose of asserting its subrogation rights to the extent of payments made to Budde, or for his benefit, pursuant to its policy of insurance with Budde's employer.

The case is a diversity case. Budde is a citizen of Louisiana and KHL is incorporated in, and has its principal place of business in Hawaii. KHL is also authorized to do business in Colorado. The citizenship of Francis is unknown, but asserted not to be Louisiana.

The parties disagree as to which law shall govern this case, plaintiff urging the law of South Vietnam and KHL urging the law of Colorado. Briefs on the choice of law

issues were ordered by Judge Winner, who advised counsel that ruling might be made without oral argument. Briefs have been filed, and Defendant has submitted a Motion for Determination of Law. This Court is now fully advised and prepared to determine the law applicable to this action without oral argument.

A federal court sitting in a diversity case must apply the law as would the courts of the forum state, Erie Railroad v. Thompkins, 304 U.S. 64 (1938), Klaxon Co. v. Stentor Electrical Mfg. Co., 313 U.S. 487 (1941), Schreiber v. Allis-Chalmers Corp., No. 78-1357 (10th Cir. Nov. 27, 1979). Indeed, in this case, plaintiff would not be in court at all but for the benefit of Colorado law. In Budde v. Kentron Hawaii, Ltd., 565 F. 2d 1145 (1977), the Court of Appeals, 10th Circuit, held that Colorado courts would assert jurisdiction over a foreign corporation qualified to do business in the state, where personal service on the

corporation is made within the state, regardless of the fact that the cause of action does not arise out of the corporation's activities within the state. This decision may be contrasted with Budde v. Ling-Timco-Vought, Inc., 511 F. 2d 1033 (10th Cir. 1975), wherein it was held that New Mexico courts would not assert jurisdiction over a foreign corporation under similar circumstances. Budde's previous attempt to bring suit in Louisiana was rejected based upon Louisiana's one-year statute of limitations. Budde v. Insurance Company of North America, 502 F. 2d 783 (5th Cir. 1974).

The Colorado Supreme Court, in First National Bank v. Rostek, 182 Colorado 437, 514 P. 2d 314 (1973), first announced its intention to follow the "most significant contacts" choice of law principles as set forth in the Restatement (Second) of Conflict of Laws ("Restatement"). In Rostek, Restatement Sec. 145, which incorporates Sec. 6, was specifically adopted as

applicable to multistate tort controversies. Subsequently several other sections of the Restatement have been adopted as Colorado's choice of law rules. See, Sabell v. Pacific Intermountain Express, 36 Colo. App. 60, 536 P. 2d 1160 (1975), applying Sec. 157 and Sec. 164; Dworak v. Olson Construction Co., 191 Colo. 16, 551 P. 2d 198 (1976), adopting Sec. 170; Murphy v. Colorado Aviation, Inc. 41 Colo. App. 237, 588 P. 2d 877 (1978), applying Sec. 175 and Sec. 178; Union Supply v. Pust, ___ Colo. ___, 583 P. 2d 276 (1978), applying Sec. 138; Casselman v. Denver Tramway, ___ Colo. ___ 577 P. 2d 293 (1978, citing Sec. 299.

Section 145 of the Restatement reads as follows:

Sec. 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in Sec. 6.

(2) Contacts to be taken into account in applying the principles

of Sec. 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The principles stated in the Restatement Sec. 6, which shall apply in the absence of statutory directive are set forth in Sec. 6 (2):

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Not all issues within a case necessarily are to be decided by same state's law. Sabell v. Pacific Intermountain Express, supra, involved a vehicular collision which occurred in the State of Iowa, in which a Colorado resident was injured as the result of the negligence of the employee truck drivers of two corporate defendants authorized to do business in Colorado. The Court held that, as to the standard of care applicable to the conduct of the parties, Iowa had the most significant interest, and that Iowa law therefore would govern the issues of standard of care to be imposed upon the drivers. The Court then went on to state that "... 'rules of conduct' are more closely related to the state where conduct occurs while 'rules of recovery' relate more clearly to the state

with which the party is identified." 536 P. 2d 1166.

In concluding that Colorado's comparative negligence statute, rather than Iowa's contributory negligence doctrine, should be applied, the Court considered the following Colorado contacts to be most significant: 1) plaintiff's domicile and residence; 2) registration and origin of plaintiff's vehicle; 3) defendant's residence and authorization to do business; 4) service of process and filing of the lawsuit.

The issues in the instant case which require the Court's ruling as to applicable law, as identified by the parties, include: 1) standard of conduct, 2) admissibility of evidence, 3) the liability of KHL for the acts of its employee, 4) the burden of proof, including the availability of presumptions such as the doctrine of res ipsa loquitur.

As to the standard of conduct, the Court is bound by the holding of Sabell. Whether or not Francis or Budde were negligent must be judged by the rules of the road of South Vietnam.

On the question of admissibility of evidence, the Federal Rules of Evidence govern proceedings in United States Courts. Federal Rules of Evidence 101.

There is no Colorado case specifically deciding which state's law should govern whether an employer must answer for the negligence of its employee. Two cases, however, seem to indicate a preference by Colorado Courts to decide corporate liability according to the law of the state of incorporation. In Casselman v. Denver Tramway Corp., supra, the Colorado Supreme Court held that "the question of whether a foreign corporation can be sued after dissolution depends on the law of the state of incorporation." 557 P. 2d at 295. In Murphy v. Colorado Aviation, Inc., supra, plaintiffs'

decedent had been a resident of California. His widow and sons, also California residents, sued a Colorado corporation in Colorado for its employee's negligence, which had resulted in the fatal airplane crash in Virginia. The corporation argued that Virginia's Wrongful Death Statute, with its damage limitation, should apply rather than Colorado's, which had no damage limitation. The Colorado Supreme Court found that, under the facts and circumstances of the case, the state with the most significant relationship with the issue was Colorado. It noted that the only interest of Virginia was the fact that the accident occurred there. In contrast, the airplane had been registered and hangered in Colorado, and was first entrusted to the pilot in Colorado. Colorado has an interest, the Court found, in seeing that domestic corporations do not negligently entrust sophisticated aircraft to insufficiently trained pilots.

Section 174 of the Restatement, concern-

ing vicarious liability, simply refers back to Sec. 145, and therefore gives the Court no additional assistance. In light of the holdings of Murphy and Casselman, however, the Court is convinced that the Colorado Supreme Court, under the facts of this case, would hold that the state with the most significant relationship to the issue of KHL's vicarious liability for the alleged negligence of its employee is Hawaii. Hawaii is the state where the relationship between employer and employee is centered and is the place of incorporation of KHL. Hawaii has the greatest interest in regulating the activities of corporations created under its laws.

Colorado's only relationship to this issue is the fortuity that KHL was subject to service here. South Vietnam's only interest is that the accident occurred there. Under Colorado case law discussed above, the law chosen for determining the question of negligence need not be the same law which governs the issue of whether a defendant may be held liable

for the negligence of another. The latter issue is more closely related to the state where the relationship between the defendant and the allegedly negligent employee is centered, in this case, Hawaii.

The final issue which requires the Court's decision as to choice of law is the burden of proof and availability of presumptions such as the presumption embodied in the doctrine of res ipsa loquitur. The Court relies heavily on the principles set forth in the Restatement Sec. 6 (2) in deciding that the Colorado Supreme Court, under the facts and circumstances of this case, would apply Colorado law on the issues of burden of proof and the availability and effect of presumptions. See Federal Rules of Evidence 302.

The Restatement rule regarding burden of proof reads as follows:

Sec. 133 Burden of Proof

The forum will apply its own local law in determining which party has

the burden of persuading the trier of fact on a particular issue unless the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of trial. In that event, the rule of the state of the otherwise applicable law will be applied.

In applying Restatement Sec. 133 to this case, the Court must consider whether the exception to the stated general rule applies. An interpretation of South Vietnamese law has been offered by plaintiff through his expert witness, Dr. Linn Van Fran. While the Court has no reason to doubt the good faith or scholarship of plaintiff's expert, the Court has the responsibility to decide the law. Fairness would dictate allowing defendant to present its own expert, and still the Court would not have the means to research or even read the applicable South Vietnamese law and come to its independent judgment on the issue. Therefore, factor (g) in the Restatement Sec. 6 (2), "ease in the determination and application of the law to be applied", must be given considerable

weight. Furthermore, if plaintiff's expert is correct that the happening of an accident, under South Vietnamese law, casts upon a defendant the burden of proving non-liability, such a rule of law offends the policies of the forum. See Restatement Sec. 6 (2) (b) and (e). In a controversy between two United States citizens, "the protection of justified expectations", calls for the application of traditional notions of due process and fair play which cast the burden of proof upon the Plaintiff. See Restatement Sec. 6 (2) (d).

Neither Louisiana nor Hawaii has a greater interest than Colorado in regulating the conduct of this lawsuit. Therefore, Colorado law will be applied in matters of burden of proof and the availability and effect of presumptions.

In summary, it is ORDERED that the Motion for Determination of Law is granted, and it is further ORDERED that:

(1) The law of South Vietnam will

govern whether the conduct of either Plaintiff or Defendant Francis was negligent.

(2) The Federal Rules of Evidence will govern evidentiary matters.

(3) The law of the State of Hawaii will govern KHL's vicarious liability for the torts of its employee, and

(4) The law of the State of Colorado will govern issues relating to burden of proof and presumptions.

It is further ORDERED that a status conference will be held on Friday, April 25, 1980 at 8:00 A.M., Room C-246, United States Courthouse, 1929 Stout Street, Denver, Colorado.

DATED this 21st day of March, 1980.

BY THE COURT:

ZITA L. WEINSHIENK
UNITED STATES DISTRICT
JUDGE

Civil Action No. 75-Z-996

Plaintiff

v.

Defendant

MINUTE ORDER

Dated:

January 14, 1981

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Secretary

IT IS ORDERED that defendant's Motion for Summary Judgment is denied because there are genuine issues of material fact remaining for resolution at trial. For the same reason, it is FURTHER ORDERED that plaintiff's Motion for Summary Judgment is denied. In light of this ruling, it is FURTHER ORDERED that the hearing on defendant's Motion for Summary Judgment, now tentatively set for January 23, 1981, at 3:00 P.M., is vacated.

Copies of the foregoing Minute Order were
duly mailed to the persons herein listed
on the 14th day of January, 1981.

Mitchell Benedict, Esq.
600 Western Federal Savings Bldg.
Denver, CO 80202

Edmond R. Eberle, Esq.
514 K & B Plaza
1055 St. Charles Ave.
New Orleans, La. 70130

Raymond J. Connell, Esq.
Hall & Evans
2900 Energy Center
717 Seventeenth St.
Denver, CO 80202

John M. Lepsack, Esq.
White & Steele
1660 Lincoln Center Bldg.
Denver, CO 80264

JAMES R. MANSPEAKER,
CLERK

By _____
Deputy Clerk/
Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 75-Z-996

JAMES ALLEN BUDDE,)
 Plaintiff)
 Vs.) JUDGMENT OF
 DISMISSAL
KENTRON HAWAII, LTD.,)
et al Defendant)

This action came on for trial on the 2nd day of February, 1981, before the Court and a jury of six duly sworn to try the issue herein, the Honorable Zita L. Weinshienk, Judge, presiding.

The trial proceeded to conclusion of the plaintiff's evidence, whereupon defendant moved for judgment of dismissal. The Court heard arguments of counsel and was duly advised. Pursuant to and in accordance with oral findings of fact, conclusions of law and ruling delivered from the Bench and incorporated herein by reference as if fully set forth, it is hereby

ORDERED that the Complaint and Amended Complaint and this action are hereby dismissed with prejudice, each party to pay his or its own costs.

DATED at Denver, Colorado, this 4th day of February, 1981.

FOR THE COURT:
JAMES R. MANSPEAKER,
CLERK

By: Stephen P. Ehrlich,
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Filed
United States
Court of
Appeals
Tenth
Circuit
MAR 21 1983
H.K.PHILLIPS
Clerk

No. 81-1225

JAMES ALLEN BUDDE,)

Plaintiff-Appellant,)

v.)

KENTRON HAWAII, LTD., and)
JESSIE B. FRANCIS,)

Defendants-Appellees.)

Appeal from the United States District
Court for the District
of Colorado
(D.C. No. 75-996)

Edmond R. Eberle, New Orleans, Louisiana,
for Plaintiff-Appellant.

Raymond J. Connell (Keven E. O'Brien of
Hall & Evans, with him on the brief),
Denver, Colorado, for Defendants-Appellees.

Before McWILLIAMS, McKAY, and SEYMOUR,
Circuit Judges.

McWILLIAMS, Circuit Judge.

This is a personal injury case. Jurisdiction is based on diversity of citizenship. 28 U.S.C. Sec. 1332. The district court directed a verdict for the defendant on the ground that the plaintiff had failed to establish a prima facie case of negligence and dismissed the action. The plaintiff appeals, contending that he presented sufficient evidence of negligence to require submission of the case to the jury. We do not agree, and therefore affirm.

I. Background

On September 27, 1970, the plaintiff, James Allen Budde, suffered serious head injuries when a military jeep in which he was riding as a passenger went off a road in South Vietnam and overturned.¹ Due to the injuries he sustained in the accident, the plaintiff has no recollection of the events which preceded the accident or of the accident itself.

After returning to the United States,

the plaintiff endeavored to ascertain the identity of the driver of the jeep and the circumstances surrounding the accident. He retained counsel. In time, the plaintiff's counsel secured a "military accident report",² which report indicated that the driver of the jeep was one Jessie B. Francis (Francis). The report also stated that Francis was an employee of Kentron Hawaii, Ltd. (Kentron). Further inquiry disclosed that Kentron is a Hawaii corporation, which, at the time of the accident, was under contract to provide electrical calibration services in South Vietnam for the United States Army. Upon obtaining this information, the plaintiff commenced the present action against

1 At the time, the plaintiff was working in South Vietnam as an airplane mechanic for Dynalectron Corporation.

2 The report was obtained from the insurance carrier of the plaintiff's employer.

Francis and Kentron.³

II. Proceedings before the
District Court

Because Francis was never located,⁴
the trial below necessarily focused on
Kentron's liability to the plaintiff.⁵
The plaintiff asserted that Kentron was
liable on two theories. First, the
plaintiff claimed that Kentron was
vicariously liable for the negligence of

3 The plaintiff has attempted unsuccessfully to litigate his claims in other forums. See Budde v. Insurance Co. of N. Am., 502 F.2d 783 (5th Cir. 1974) (action barred by statute of limitations); Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033 (10th Cir. 1975) (Court lacks jurisdiction over Kentron).

4 Francis is no longer employed by Kentron.

5 The district court originally dismissed the case on the ground that it lacked personal jurisdiction over Kentron. However, this court reversed that ruling in Budde v. Kentron Hawaii, Ltd., 565 F.2d 1145 (10th Cir. 1977).

Francis under the theory of respondeat superior. Second, the plaintiff asserted that Kentron was directly liable under the theory of negligent entrustment.⁶

At trial, the plaintiff attempted to introduce as evidence a copy of the military accident report, to which was attached an account of the accident purportedly written by Francis; the deposition of Francis' supervisor in Vietnam, who recalled that Francis had reported the accident to him; and Kentron's answers to interrogatories propounded by the plaintiff. According to the plaintiff, all three documents showed that Francis' negligence caused the accident. No other proof of negligence was offered.

6 The plaintiff in his initial brief alleged that Francis was grossly negligent. During trial, however, the arguments focused on whether the plaintiff could establish mere negligence. We should also note that the plaintiff apparently did not contend that the doctrine of res ipsa loquitur applied in this case.

The district court refused to admit the military accident report, the statement attached to it, and portions of the interrogatories. The district court did, however, admit the deposition of Francis' supervisor and the remaining interrogatories. The deposition and interrogatories were then read to the jury, after which the plaintiff rested his case. At this point, Kentron moved for a directed verdict. The district court granted the motion, noting that the plaintiff had not established a prima facie case of negligence and specifically declaring that the result would have been the same even if all of the evidence tendered by the plaintiff had been admitted.

III. Discussion

On appeal, the plaintiff argues that the district court's evidentiary rulings were incorrect and that, in any event, there was sufficient evidence of negligence to warrant submitting the case to the jury. We agree with the district court that a

directed verdict would have been appropriate even if all of the evidence tendered by the plaintiff had been admitted. Accordingly, we affirm without addressing the evidentiary question.⁷

The propriety of the directed verdict must be tested by federal law. Lupton v. Torbey, 548 F.2d 316 (10th Cir. 1977). Under federal law, a verdict may not be directed unless "all the inferences to be drawn from the evidence are so patently in favor of the moving party that reasonable men could not differ as to the conclusions to be drawn therefrom". Hidalgo Properties, Inc. v. Wachovia Mortgage Co., 617 F.2d 196, 198 (10th Cir. 1980). Further, "(a)ll such evidence and the inferences in this regard must be construed in the light most favorable to the party against whom the motion is directed."

⁷ For purposes of discussion, then, we assume that all of the evidence tendered by the plaintiff was admitted.

Id. (Citing Wilkins v. Hogan, 425 F.2d 1022 (10th Cir. 1970)).

The "evidence" produced by the plaintiff viewed in the light most favorable to him indicates as follows: (1) that Francis was the driver of the jeep, (2) that at the time of the accident it had just begun to rain, (3) that the jeep was traveling at approximately 30 miles per hour, (4) that the accident occurred while Francis was passing a slower automobile, (5) that the jeep skidded after encountering a "slick spot on the black top", and (6) that the "left front wheel on the jeep either locked or collapsed thus making the jeep roll". Nothing else is shown.

In our view, it is not possible to infer negligence from these facts. There is simply no basis for concluding that Francis was or was not negligent. See, e.g., Yeager v. Lathrop, 28 Colo. App. 44, ___, 470 P. 2d 609, 611 (Colo. Ct. App. 1970).⁸ Further, proof that an accident occurred alone is not enough to establish negligence. See, e.g.,

Thiele v. State, 30 Colo. App. 491, ___,
495 P. 2d 558, 561 (Colo. Ct. App. 1972).

Accordingly, we conclude that the district court did not err in directing a verdict for Kentron on the issue of Francis' negligence. Given this determination, we must also affirm the dismissal of both of the plaintiff's claims.⁹

Judgment affirmed.

8 In that case, the court stated that the "burden of proof of negligence rests on him who asserts it, and where the evidence presents no more than an equal choice of probabilities, it is not sufficient to meet the burden". Yeager v. Lathrop, 28 Col. App. 44, ___, 470 P. 2d 609, 611 (Colo. Ct. App. 1970).

9 Negligence by the entrustee is an element of negligent entrustment. See, e.g., Gill v. Schaap, 601 P.2d 545, 547 n.1 (Wyo. 1979); Hines v. Nelson, 547 S.W. 2d 378, 385 (Tex., Civ. App. 1977); Saunders v. Vickers, 116 Ga. App. 733, ___, 158 S.E.2d 324, 327 (Ga. Ct. App. 1967). For this reason, the determination that there was not sufficient evidence that Francis was negligent disposes of the plaintiff's negligent entrustment claim.

MILITARY POLICE REPORT

Date

Sunday, 27 September 1970

Time

1600 Hours

Reservation

() ON (X) OFF

Road

Highway No. 1, Approximately 10 Miles
North on DBT

Not At Intersection

Nearest Intersection

10 Miles South of Don-Be-Tin

Driving Lanes

Two

Character

Curve

Surface

Black

Condition

Mud

Defects

Loose Material on Surface

Weather

Clear

USA Reg. or License No.

2M6534

Vehicle

Make

Jeep

Year

1966

Unit Markings

Kentron Hawaii, Ltd.

Part of Vehicle Damaged

Totaled

Vehicle Removed To

Stolen

Name

U. S. Army

Name, Grade, Street, Unit or Address: Driver

J. B. Francis

Kentron Hawaii, Ltd.

c/o 125th Signal Company

- - - - - (?)

Position in Vehicle

Driver / D

Age

Sex

38

M

Inj.

A / A (?)

Driver's Permit No. and State

Military Driver's License Lost in Accident

Driving Experience

25 Years

Limitations on Permit

No

Driver of Vehicle Was Headed

() N (X) S () E () W

On Highway or Street

Highway No. 1 RVN

Driver's Action Before Accident

Skidding

Name and Address

J. B. Francis - 125th Signal Company

Name and Address

James A. Budde - 1st RNR Co. (AVN)

Position in Vehicle

Francis - Driver
Budde - Right Front

Age

Francis - 38
Budde - 24

Sex

Francis - M
Budde - M

Injury

Francis - "A"
Budde - "A"

Name of Person Action Taken On

J. B. Francis - Treated at Scene of Accident
James A. Budde- Taken to Hospital

Name and Address of Hospital

12th Field Hospital
Cam Ranh Bay